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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 12, 1971.[1]

[1]The petitioners in addition to David Moor are William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle. The respondents in addition to the County of Alameda are Frank I. Madigan, Glenn Dyer, Thomas L. Houchens, Louis Santucci and Lawrence L. Riche. David Moor and the Rundles each filed a separate case in the district court against the above named respondents. Because the issues raised on appeal to the court below in each case are identical, except that the Moor case involves the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (See Appendix C, *infra* at 14.)

Citations to Opinions Below.

The opinion of the Circuit Court of Appeals, a copy of which is attached hereto as Appendix A, *infra* at 1, is unreported as yet. A copy of the order of the Circuit Court of Appeals denying petitioners' petition for rehearing and for rehearing in banc is attached hereto as Appendix B, *infra* at 13. A copy of the order of the Circuit Court of Appeals consolidating the above captioned matters and granting petitioners' motion for an expedited hearing is attached hereto as Appendix C, *infra* at 14. Copies of the orders of the District Court, or portions thereof, which relate to the issues involved herein, are attached hereto as Appendices D, E and F, *infra* at 15, 18 and 21 respectively, and the order attached as Appendix F is reported in 331 F.Supp. 492. Portions of companion cases relating to the issues involved herein are attached hereto as Appendices G and H, *infra* at 31 and 32 respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1972. A timely petition for rehearing was filed on April 24, 1972 and denied on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether, if state law imposes vicarious liability upon its public entities for the Civil Rights Act (42 U.S.C. §§1981 *et seq.*) violations of the entities' employees, *Monroe v. Pape*, 365 U.S. 167 (1961), allows a federal court to use 42 U.S.C. §1988 to adopt that state law and obtain jurisdiction under 28 U.S.C.

§§1343(3) and (4) to impose that state-created liability.

2. Whether *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), allows a federal court the power to exercise jurisdiction over a party on a pendent state law claim when such party is not involved in the related federal claim.

3. Whether Alameda County is a "citizen" of California for diversity jurisdiction purposes.

Statutes Involved.

28 U.S.C. §§1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the

United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Statement of the Case.

The jurisdiction of the district court was invoked in each of these cases pursuant to 28 U.S.C. §§1343(3) and (4) because of questions arising under acts of Congress providing for the protection of civil rights (28 U.S.C. §§1981, 1983, 1985, 1986 and 1988). In the *Moor* case jurisdiction was also invoked pursuant to 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendants citizens of California. Pendent state law claims against each of the defendants were also joined in each of the cases.

The pertinent facts are summarized in the decision of the court below and the following statement is from that decision:

> "The claims arose out of the May, 1969, People's Park" disturbance or riot, in which appellants were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time and place on behalf of the County.

"On February 12, 1970, appellants brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Act, 42 U.S.C. sections 1981-1988, and pendent state claims under sections 810 *et seq.* of the California Government Code (hereinafter Tort Claims Act). Both federal and state causes of action were premised on the theory that the county could be held vicariously liable for the acts of the deputies.

"Both appellants alleged jurisdiction in the district court pursuant to 28 U.S.C. section 1343. Appellant Moor also alleged diversity jurisdiction under 28 U.S.C. section 1332.

"The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The County also argued that, as the federal claims were not viable, the pendent state claims must also be dismissed. In addition, in the *Moor* case, the County separately moved to dismiss for lack of diversity, contending in part that the County was not a "citizen" for federal diversity jurisdiction purposes.

"The trial court ultimately granted all of these motions and ordered that all claims against the County be dismissed. These appeals are taken from that order." Appendix A, *infra* at 1-2.

The court below subsequently affirmed these orders of the district court. (See Appendix A, *infra* at 1.) On May 30, 1972 petitioners' petition for rehearing in banc was denied. (See Appendix B, *infra* at 13.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

I.

There Is a Conflict in Decisions of the Circuit Courts of Appeals on Whether, if State Law Imposes Vicarious Liability Upon a Public Entity for the Civil Rights Act (42 U.S.C. §§1981 et seq.) Violations of the Entity's Employees, Monroe v. Pape, 365 U.S. 167 (1961), Allows a Federal Court to Use 42 U.S.C. §1988 to Adopt That State Law and Obtain Jurisdiction Under 28 U.S.C. §§1343(3) and (4) to Impose That State-Created Liability.

The decision of the court below (Appendix A, *infra* at 1) that *Monroe v. Pape*, 365 U.S. 167 (1961) precludes a federal court from imposing vicarious liability upon a public entity for the Civil Rights Act (42 U.S.C. §1981 *et seq.*) violations of the entity's employees, assuming state law imposes such vicarious liability, is in apparent conflict with the decision of the D.C. Circuit Court of Appeals in *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S. Oct. 26, 1971) (No. 71-564), *cert. granted*, ... U.S. ...., 92 S.Ct. 683 (1972).[2] Moreover, this conflict has been expressly recognized by these two respective courts.

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[2]As reported in the United States Law Week, the two questions presented are:

> "(1) May D.C. supervisory police officials be held liable to victim of false arrest and assault by D.C. policemen for their alleged negligence in training and supervising these officers? (2) May D.C. and supervisorial police officials be held liable under the 1871 Civil Rights Act to victim of false arrest and assault by D.C. policemen?"

Since the jurisdictional questions of pendent party and diversity are not involved in *Carter*, and since the nature of the Civil Rights Act jurisdiction issue raised in *Carter* (expanded scope of 42 U.S.C. §1983) may well differ from the related issue

In *Carter*, the court construed *Monroe* as providing only a limited bar to suit in a federal court against municipalities under the Civil Rights Act. To reach that result the court concluded that where a parent state no longer chose to clothe a municipality with immunity from liability for the Civil Rights Act violations of its employees, the scope of the Civil Rights Act should be adjusted accordingly. Relying upon 42 U.S.C. §1988 the court then stated:

> "The Supreme Court has construed §1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability. Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). If local law recognizes government liability where federal common law might not, then §1988 seems to provide that the local rule shall govern in an action under §1983.[36]

[36]"The Ninth Circuit has rejected the argument that municipal liability under §1983 is controlled by state law. Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968). In that case, however, it does not appear that the relevance of §1988 was argued." 447 F.2d at 369.

The court below, however, when presented with the above analysis from *Carter*, chose to reject it and rely, instead, upon its earlier decision in *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). That reliance, though, is not responsive to the issue involved herein since *Brown* holds only that liability under 42 U.S.C.

raised herein (use of 28 U.S.C. §§1343(3) and (4) and 42 U.S.C. §1988 to impose a state created liability), certiorari should also be granted in this matter so that the entire scope of questions raised in this area by the conflicting decisions of the Circuit Courts of Appeals can be finally determined.

§1983 cannot be enlarged by state law, whereas the issue herein involves whether a federal court can impose a state created liability through utilization of 42 U.S.C. §1988. In response to that analysis, the court below stated:

> "Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, *it is inconsistent with our decision in* Brown v. Town of Caliente *and we do not follow it.*" Appendix A, *infra* at 6. (Emphasis added.)

The Seventh Circuit Court of Appeals has purported to deal with the §1988 issue involved herein in *Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971). However, while recognizing the above dichotomy of opinion between the *Brown* court and the *Carter* court on the scope of *Monroe*, the *Ries* court avoided the issue by resting its decision on an analysis similar to *Brown*, namely that state law could not enlarge the scope of §1983.

Thus, at the present time there is an apparent conflict between the court below and the D. C. Circuit Court of Appeals on the effect, if any, of *Monroe* on a federal court's ability to utilize §1988 to recognize and impose a state created liability upon a public entity for the federal Civil Rights Act violations of the entity's employees. On the merits of the issue, petitioners see no conflict in adhering to *Monroe's* holding that Congress did not intend to impose liability under 42 U.S.C. §1983 upon a municipality for the Civil Rights Act violations of its employees and the position they urge that a state has the absolute right to impose such liability if it chooses to do so and that a federal court has

the jurisdiction to impose that state created liability pursuant to 28 U.S.C. §§1343(3) and (4) because of 42 U.S.C. §1988. Under this analysis there is no enlargement of the liability scope of §1983.[8]

In pointing out the conflict in decisions discussed above, mention should be made of the fact that the *Carter* court did have an alternative basis for its holding, to-wit, the plenary power of Congress to impose liability upon the District of Columbia. Petitioners submit, however, that that alternative holding does not in any way diminish the fact that there is still this conflict in decisions of the Courts of Appeals on the scope of *Monroe*. Each court has clearly enunciated its view, and in an area as important as federal civil rights this conflict should not be allowed to remain.

The necessity for resolving this conflict can be seen from the fact that the trend among states is to abolish the doctrine of sovereign immunity and to make entities such as the County of Alameda financially responsible for the torts of their employees. As a result, the question of whether a federal court can use 42 U.S.C. §1988 to adopt these state laws for the protection of federal rights and thus obtain jurisdiction over a public entity by virtue of 28 U.S.C. §§1343(3) and (4) is a highly important question that is bound to continue to arise and create confusion until a definitive ruling is handed down by this Court. Since such definitive ruling must, of necessity, involve an interpretation of *Monroe*, only this Court can now make that ruling.

---

[8]While petitioners have not urged the expanded scope of §1983 analysis urged by the respondent in *Carter*, petitioners herein do support such analysis as an alternative approach. However, to avoid repetition, and because petitioners believe that the approach they suggest is more logically consistent with *Monroe*, petitioners will leave the expanded scope of §1983 analysis to the respondent in *Carter*.

One final point to be made on this issue is that the kind of analysis petitioners now urge this Court to make has been made, ironically, by the court below in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971). The only difference is that in *Hesselgesser* the court below, through §1988, looked to Washington law that imposed vicarious liability upon a sheriff for the Civil Rights Act violations of a deputy. While the *Hesselgesser* court gave no explanation of its basis for jurisdiction, which, in turn, caused the district court in these cases a certain amount of consternation (see Appendix F, *infra* at 28-30), it would seem that the court below had to rely for jurisdiction upon 28 U.S.C. §§1343(3) and (4) since it has categorically rejected the notion that a party can be joined on a pendent state claim when he has no involvement in the related federal claim. (See discussion in part II, *infra*.) Moreover, the effort of the court below to explain *Hesselgesser* by reference to §1983 liability concepts is irrelevant since only a state-created liability was being imposed.

II.

There Is a Conflict in Decisions of the Circuit Courts of Appeals on Whether United Mine Workers v. Gibbs, 383 U.S. 715 (1966), Allows a Federal Court the Power to Exercise Jurisdiction Over a Party on a Pendent State Law Claim When Such Party Is Not Involved in the Related Federal Claim.

The decision of the court below (Appendix A, *infra* at 1) holding that *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) does not allow a federal court the power to exercise jurisdiction over a party on a pendent state law claim when there is no viable federal claim involving that party is directly in conflict with numerous decisions of other Circuit Courts of Ap-

peals which have construed *Gibbs* on this issue. See, *e.g., Leather's Best, Inc. v. S. S. Mormaclynx,* 451 F. 2d 800 (2d Cir. 1971); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971); *Hatridge v. Aetna Cas. & Sur. Co.,* 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone,* 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen'l Life Ins. Co. v. Craton,* 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.,* 392 F.2d 149 (3d Cir. 1968); *Wilson v. American Chain and Cable Co.,* 364 F.2d 558 (3rd Cir. 1966). Moreover, not only is this conflict expressly recognized by the Circuit Courts of Appeals, but it has produced decisions in which there is express criticism of each others' position.

Exemplifying this conflict and criticism are the following observations from the *Hatridge* and *Astor-Honor* opinions followed by the response of the court below. In *Hatridge,* which was written by Mr. Justice Blackmun prior to his appointment to this Court, the court stated:

> "The Ninth Circuit, however, has refused to follow the Third Circuit precedent and has rejected pendent jurisdiction over a consortium claim. Hymer v. Chai, 407 F.2d 136, 137-138 (9 Cir. 1969). The court felt that it was bound by its earlier decision in an [sic] non-consortium case. Takashi Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9 Cir. 1940), cert. denied, 312 U.S. 700, 61 S.Ct. 739, 85 L.Ed. 1134. . . .
>
> "The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not re-

ferred to by that name, was given some vitality. . . .

"In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. *It makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time.* We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here." 415 F.2d at 817. (Emphasis added.)

Similarly, in *Astor-Honor*, the court stated:

"There are indeed many statements supporting 'the general proposition' enunciated by the district court, notably, for our purposes, that in Wasserman v. Perugini, 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same accident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, '[c]ases antedating [United Mine Workers (of America) v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966),] that denied judicial power, i. e., jurisdiction, over the pendent claim are suspect as authority.' 3A Moore, Federal Practice ¶ 18.07[1.-4] (1970). The Gibbs Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S.Ct. at 1138:

"'The statee and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordiinarily be expected to try them all in one judiicial proceeding, then, assuming substantiality cof the federal issues, there is *power* in federal ccourts to hear the whole. [Emphasis the court's.]]'

"*Although thee pendent claim in* Gibbs *did not include a parrty not named in the federal claim, Mr. Justice B3rennan's language and the common sense consideerations underlying it seem broad enough to cowver that problem also.* . . . The only post-*Gibbs* court of appeals decision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting fedleral jurisdiction is Williams v. United States, 405 F.2d 951, 955 (9 Cir. 1969). This presented the ssame problem as this court had faced, long before *Gibbs*, in Wasserman v. Perugini, *supra*, namelyy, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approvedd the district court's dismissal of these defendants, *wee are not at all sure we would agree with this insofiar as the decision rested on a general theory of lackk of power.*" 441 F.2d at 629-630. (Emphasis addded.)

However, when presented with this trend of post-*Gibbs* decisions, thee court below chose not to follow them but, instead, to reiterate its position in *Hymer v. Chai*, 407 F.2d 1136 (9th Cir. 1969) on the absence

of power in a federal court to exercise jurisdiction over a party who was not involved in a related federal claim. While expressly noting the trend of post-*Gibbs* decisions cited above, the court below went on to state:

> "However, there are numerous decisions which have reached the opposite conclusion. Moreover, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because that claim is related to a federal claim against an existing party. Another has stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist. Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized as having 'strained for jurisdiction.' (Appendix A, *infra* at 8-9.)
>
> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims." (Appendix A, *infra* at 10.)

Having, thus, clearly reiterated its position in *Hymer*, that federal district courts in the Ninth Circuit do not have the power to consider whether to exercise jurisdiction on a pendent state claim over a party who is not

involved in the federal claim, the court below went on to intimate that the district court, as a matter of discretion, refused to exercise jurisdiction. Petitioners submit, however, that the court below erred in attributing to the district court a holding that it would not, as a matter of discretion, hear the state claims against the County when the district court specifically stated in its opinion that in view of *Hymer*, it "is devoid of the power to adjudicate the state claim against the County; *the issue is not one of discretion.*" (Appendix F, *infra* at 23.) (Emphasis added.)

While the district court intimated it might choose not to hear the state claims, assuming it had discretion to do so, such intimation in no way reflected the district court's final word on the matter. Indeed, the district court in footnote 5 of its order specifically stated that it was not expressing any opinion on what it would do if it were free of the influence of *Hymer*. (Appendix F, *infra* at 27-28.) Thus, to uphold the district court's decision on the ground that it exercised its discretion in refusing to take jurisdiction over the County is simply contrary to what the district court did and unfair to petitioners. At a minimum, if the lack of power concept in *Hymer* is to be reversed so that the district court might have the power to exercise its discretion, then the matter ought to be sent back to the district court for consideration in the light of that knowledge.

It should also be apparent that in spite of the allusion by the court below to an exercise of "discretion" by the district court, the fact still remains that as a result of the decision by the court below federal district courts in the Ninth Circuit are now without the power to exercise jurisdiction on a pendent state law

claim over a party who is not involved in a related federal claim.

In support of its decision, the court below claims to have found "ample support" in *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965). But, the fact is that neither can be said to support the lack of power concept. In *Patrum* the court expressly recognized the power of the district court to join the city and merely upheld the district court's exercise of discretion to refuse to join the City. As for *Wojtas*, it was decided before *Gibbs* and must be viewed accordingly. Thus, only the Ninth Circuit is contrary to the trend of post-*Gibbs* decisions in other circuits which expressly hold that pendent jurisdiction allows for the joinder of parties as well as claims.

Moreover, contrary to the observation of the court below that *Patrum* and *Wojtas* are the only two cases that involved the precise question raised herein, at least one federal district court has recently adopted petitioners' interpretation of *Patrum* and ruled that it did have the power to exercise jurisdiction over the City of Council Bluffs in a fact situation that is indistinguishable from the instant case. See *Eidschun v. Pierce*, 335 F. Supp. 603, 609-614 (S.D. Iowa 1971). Petitioners are, of course, of the view that the same kind of analysis that was made in *Eidschun* should be made herein. In addition, *Eidschun* points up that there is even a conflict in decisions on the precise question involved herein.[4]

---

[4]The respondent in *Carter* assumes in his brief to this Court that even if he is wrong on the expanded scope argument of §1983, pendent jurisdiction would still be available to join the District of Columbia as a pendent party. See Brief for Respondent

In sum, the question of pendent parties is one of major importance to the entire scope of federal jurisdiction. The resolution of this issue involves an interpretation of this Court's holding in *United Mine Workers v. Gibbs, supra.* To date, the majority of the Circuit Courts of Appeals have interpreted *Gibbs* as allowing for the joinder of parties against whom there is no independent basis of federal jurisdiction, provided the considerations for the exercise of pendent jurisdiction are otherwise met. The Ninth Circuit Court of Appeals, however, stands in flat contradiction to this trend. Thus, only this Court can now resolve this conflict and insure that all persons have the same jurisdictional rights in all federal courts.

III.

The Ninth Circuit Court of Appeals' Refusal to Recognize Alameda County as a "Citizen" of California for Diversity Jurisdiction Purposes Is in Direct Conflict With Decisions of This Court and Other Courts of Appeals on This Same Kind of Issue.

To petitioners' knowledge the only decisions holding that a county is not a "citizen" of a state for diversity jurisdiction purposes emanate from the court below. Moreover, that holding seems to be limited to California counties since at least one district court within the Ninth Circuit has refused to follow the court below on this issue. See *White v. Umatilla County,* 247 F.Supp.

43, n. 40, in *District of Columbia v. Carter,* No. 71-564. If the respondent is correct concerning the power in the D. C. Circuit to join pendent parties, this fact further highlights the conflict among the circuits in this area of federal jurisdiction.

918 (D. Ore. 1965). In refusing to follow the court below, *White* stated:

> "A long line of federal decisions, including, but not limited to, Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Chicot County v. Sherwood, 148 U.S. 529, 13 S.Ct. 695, 37 L.Ed. 546 (1893); Great No. Life Ins. Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944), and Pettibone, et al., v. Cook County, 120 F.2d 850 (8th Cir. 1941), hold that a county is not such an integral part of the state, as to be immune from jurisdiction under the diversity statute." *Id.* at 919-920.

To this same effect is the following statement by the Sixth Circuit Court of Appeals in *Brown v. Marshall County, Kentucky*, 394 F.2d 498, 500 (6th Cir. 1968):

> "Also without merit is the county's contention that it is not a 'citizen' of Kentucky for purposes of diversity of citizenship under 28 U.S.C. § 1332. In Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 19 L.Ed. 86, the Supreme Court held that for purposes of diversity jurisdiction a county is a citizen of the State in which it is located."

In the *Moor* case, the district court recognized this long line of federal authority, but concluded as follows:

> "While plaintiff's argument on this threshold point has substantial merit, this court is bound to recognize and adhere to the Ninth Circuit decisions which hold that California counties and other subdivisions of the State are not 'citizens' for diversity purposes. *Lowe v. Manhattan Beach*

City School District, 222 F.2d 258 (1955); *Miller v. County of Los Angeles*, 341 F.2d 964 (1965), 364 F.2d 500 (1966), *cert. denied* 386 U.S. 990 (1967). This court is fully cognizant of the fact that the substantial weight of authority is contra the position of the Ninth Circuit; moreover, this court is also aware of the possibility that the question of whether California counties are 'citizens' within the meaning of § 1332 may not have received from the Ninth Circuit the full attention and complete analysis which the question obviously deserves. See *White v. Umatilla County*, 247 F.Supp. 918 (D. Or. 1965). Nonetheless, this court is not free to disregard the reasonably clear conclusion of law contained in the above-cited cases. Re-examination of that conclusion is for the Ninth Circuit." (Appendix E, *infra* at 18-19.)

Yet, in spite of this long line of federal authority and the obvious concern by district courts within the Ninth Circuit as to whether the court below has fully considered the matter, the court below in Moor merely referred without analysis to its earlier opinion which held that a California county was not a "citizen" of California for diversity jurisdiction purposes.

In holding as it did, petitioners submit that the court below ignored the express mandate of this Court in *Kramer v. Caribbean Mills*, 394 U.S. 823, 829 (1969) that "[t]he existence of federal jurisdiction is a matter of federal, not state, law" and, thus, failed completely to give the question "the full attention and complete analysis which [it] obviously deserves." (Appendix E, *infra* at 19.) What the court below should have done is engage in an analysis of the nature

of the County and recognize that the mere fact that state law classifies the County as a "state agency" does not preclude a federal court from holding it to be a "citizen" of the state for diversity jurisdiction purposes. See, *e.g., Department of Highways of La. v. Morse Bros. & Assoc.*, 211 F.2d 140, 144-145 (5th Cir. 1954); *Morgan Dallas Corp. v. Orleans Parish School Board*, 302 F.Supp. 1208, 1209 (E.D. La. 1969); *George A. Fuller Company v. Coastal Plains, Inc.*, 290 F.Supp. 911, 915-916 (E.D. La. 1968); *Moss v. Calumet Paving Company*, 201 F.Supp. 426, 430-431 (S.D. Ind. 1962). Exemplifying the kind of analysis which must be made when a defendant claims it is an agency of the state are the following observations from *Morgan Dallas Corp.*:

> "Of course, the School Board is an agency of the State; its action is state action. But since it is also a body corporate, with power to sue and be sued (LSA-R.S. 17:51), to purchase and to hold property (LSA-R.S. 17:81), to sell property (LSA-R.S. 17:87.6), and to make contracts (LSA-R.S. 17:81, 83), it is considered a citizen separate from the state itself for purposes of diversity jurisdiction. Department of Highways of La. v. Morse Bros. and Assoc., 5 Cir. 1954, 211 F.2d 140; Belle Fontaine Towing Co. v. Dept. of Hys., State of La., E.D.La. 1967, 271 F.Supp. 60; George A. Fuller Company v. Coastal Plans, Inc., E.D.La. 1968, 290 F.Supp. 911; C. H. Leavell & Co. v. Board of Comm'rs & Dept. of Hys., State of La., E.D.La. 1969, memorandum opinion." 302 F.Supp. at 1209.

With respect to the issue involved herein, the most recent pronouncement by the California Supreme Court

on the nature of a California county can be found in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 (1971). The court there stated:

> "Code of Civil Procedure section 1085 states that the writ may be issued to any 'inferior tribunal, corporation, board or person.' While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638-639 [2 Cal.Rptr. 758, 349 P.2d 526]; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 627-628 [59 P. 2d 139, 106 A.L.R. 903]; *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 636-637 [63 P. 78, 621]; *Pitchess v. Superior Court* (1969) 2 Cal.App.3d 653, 656-657 [83 Cal. Rptr. 41]), counties have also been declared public corporations or quasi-corporations. (*Pitchess v. Superior Court, supra; Whelan v. Bailey* (1934) 1 Cal.App.2d 334, 339 [36 P.2d 709], overruled on other grounds in *Estate of Miller* (1936) 5 Cal.2d 588, 591 [55 P.2d 491]; *Smith v. Myers* (1860) 15 Cal. 33, 34; 1 McQuillin, Municipal Corporations (3d ed.) §2.46, pp. 496-497.) In view of Government Code section 23003, which provides that a county is 'a body corporate and public,' and section 23004, subdivision (a) of the same code, which states that counties may sue and be sued, we think that a county is sufficiently corporate in character to justify the issuance of a writ of mandate to it."

Given this "corporate" status of a California county, and the fact that it has, under California law, the

power to sue and be sued (§§945 and 23004(a) of the California Government Code), as well as the powers to "[p]urchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law" (§23004(b) of the California Government Code), to "[m]ake contracts and purchase and hold personal property necessary to the exercise of its powers" (§23004(c) of the California Government Code) and to "[m]anage, sell, lease, or otherwise dispose of its property . . ." (§23004(d) of the California Government Code), logic and federal law compel the conclusion that a California county should be considered a "citizen" separate from the state for diversity jurisdiction purposes. Indeed, California law fully recognized this distinction between the state as an entity and a county as an entity when it enacted §23011 of the Government Code:

> "The name of a county designated in this chapter is its corporate name, and it shall be designated thereby in any action or proceeding touching its corporate rights, property, and duties."

In view of the above, as well as the overwhelming body of federal law that holds counties to be "citizens" of their states for diversity jurisdiction purposes, there can be no justification for continuing the fiction that a California county is, in reality, the State. California counties are considered to be separate viable entities having numerous rights and duties like any other person or corporation, and under recent California case authority are even deemed to be corporate in character. They should, therefore, be deemed to be "citizens" for diversity jurisdiction purposes.

IV.

Conclusion.

This petition involves three primary questions of federal jurisdiction upon which, for each question, there is a conflict in decisions among the Circuit Courts of Appeals. Moreover, this conflict is neither subtle nor unknown, but has reached the point where the Circuit Courts of Appeals have become expressly critical of each others' views. The result is that plaintiffs in different parts of the country now find themselves with differing federal jurisdictional rights, not only in the area of federal Civil Rights Act cases, but also with respect to every conceivable kind of case which can be brought in a federal court.

Additionally, the importance of the issues raised in this petition is, perhaps, best exemplified by the fact that legal scholars throughout the country have indicated a desire to write about them. See Appendices I and J attached hereto, *infra* at 33 and 34 respectively.

Given these conflicts, therefore, which go to the very heart of an area as important as federal jurisdiction, and the fact that the conflicts result in large part from a difference of opinion on what certain decisions of this Court mean, only this Court can resolve the conflicts and insure that concepts of federal jurisdiction will be uniform throughout the Circuits.

For these reasons petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: June 27, 1972.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

David Moor, Plaintiff-Appellant, vs. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendants-Appellees. No. 71-3019.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiff-Appellant, vs. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendant-Appellee. No. 71-3020.

Filed: April 12, 1972.

On Appeal from the United States District Court for the Northern District of California.

Before: HAMLIN, MERRILL and DUNIWAY, Circuit Judges.

HAMLIN, Circuit Judge:

These are appeals from an order of the United States District Court for the Northern District of California dismissing appellants' claims against the County of Alameda (hereinafter County).

The claims arose out of the May, 1969, "People's Park" disturbance or riot, in which appellants were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time and place on behalf of the County.

On February 12, 1970, appellants brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Act, 42 U.S.C. sections 1981-1988, and pendent state claims under sections 810 *et seq.* of the California Government Code (hereinafter Tort Claims Act). Both federal and state causes of action were premised on the theory that the county could be held vicariously liable for the acts of the deputies.

Both appellants alleged jurisdiction in the district court pursuant to 28 U.S.C. section 1343. Appellant Moor also alleged diversity jurisdiction under 28 U.S.C. section 1332.

The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The County also argued that, as the federal claims were not viable, the pendent state claims must also be dismissed. In addition, in the *Moor* case, the County separately moved to dismiss for lack of diversity, contending in part that the County was not a "citizen" for federal diversity jurisdiction purposes.

The trial court ultimately granted all of these motions and ordered that all claims against the County be dismissed. These appeals are taken from that order.

Three broad issues are thus presented by appellants. First, they argue that their Civil Rights Act claims against the County are viable, notwithstanding the fact that the County is not a "person" within section 1983 of the Act. Second, they contend that even if they did not present a cognizable federal cause

of action against the County, the district court should have retained jurisdiction of the pendent state claims against the County. Finally, appellant Moor argues that the County is a "citizen" for federal diversity jurisdiction purposes.

I. *The Civil Rights Act claims.*

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court, faced with a Civil Rights Act action against the City of Chicago stemming from the acts of certain of its police officers, held that muncipalities are not "persons" within the meaning of 42 U.S.C. section 1983,[1] and were thus excluded from its coverage.

Appellants state that they are not taking issue with that holding.

Instead, they contend that the *Monroe* holding should be limited to mean only that congressional enactment of section 1983 did not purport to impose vicarious liability on municipalities through federal law when no such liability existed under state law. From this position, they reason that when state law provides for the imposition of such liability, a federal court may properly entertain claims brought thereunder.

Appellants further contend that enforcement of these state-created rights in federal court can be effected

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[1] 42 U.S.C. section 1983, in pertinent part, reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

pursuant to the mandate of 42 U.S.C section 1988,[2] which permits the adoption of state law in order to make the Civil Rights Act fully effective.

Thus they claim that, as California permits the imposition of vicarious liability against a municipality,[3] and as they are seeking enforcement of this liability under section 1988, not section 1983, the holding in *Monroe v. Pape* is inapposite.

We do not agree.

In *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968), this court considered the argument that abolition of sovereign immunity in Nevada would allow the court to entertain a section 1983 action against a Nevada municipality. In rejecting that argument, the court noted:

> The Supreme Court having considered the Civil Rights Act, and having held municipalities were not liable under it, we cannot see how any action

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[2]42 U.S.C. section 1988, in pertinent part, provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State . . ., so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, . . ."

[3]There appears to be some question as to whether or not California law would impose vicarious municipal liability on the facts of this case. However, as we conclude that these claims are not maintainable in federal court, we do not reach the issue.

> by the state of Nevada, either by its courts or by the legislature, . . . by abolishing sovereign immunity in Nevada, can bring about a different reading or different result to *Monroe v. Pape*. . . . 392 F.2d at 548.

However, appellants urge that *Brown*, like *Monroe*, is not applicable to their appeals, because the *Brown* court had not considered the relevancy of section 1988.

In support of this view, appellants rely heavily on *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971). *Carter*, in pertinent part, involved a section 1983 suit against the District of Columbia, resulting from the acts of certain of its police officers. In discussing *Monroe v. Pape* as a potential bar to the suit, the *Carter* court concluded that *Monroe* presented only a limited bar, and was not applicable to the extent that local law now permitted such suits.

The *Carter* court similarly relied on the language of section 1988 to support this conclusion, and also similarly implied that the *Brown* court might have reached a different result, had section 1988 been considered.[4]

Appellants' reliance on *Carter* is, however, misplaced. The *Carter* court specifically rested its conclusion on a second independent ground, that Congress had plenary power to impose liability on the District of Columbia; thus the factors that caused the *Monroe* court to hold the Civil Rights Act inapplicable

[4] 447 F.2d at 369 n.36.

to ordinary municipalities had no application to suits against the District. Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, it is inconsistent with our decision in *Brown v. Town of Caliente* and we do not follow it.[4b]

Appellants have also contended that this court has previously endorsed the view that state law may be applied under section 1988 in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971).

While it is true that in *Hesselgesser* this court did apply state law to hold a sheriff vicariously liable for the civil rights violations of his deputies, that holding has no impact on our finding that *Monroe v. Pape* and *Brown v. Town of Caliente* control this appeal. *Hesselgesser* held only that state law could be applied pursuant to section 1988 "under appropriate circumstances." 440 F.2d at 903. Clearly, the sheriff held liable in *Hesselgesser* was a "person" within the meaning of the Civil Rights Act, as defined by *Monroe*. Thus, imposition of liability upon the sheriff was appropriate and in no way conflicts with the *Monroe* holding.

These appeals, however, present a totally different situation. Were appellants allowed to enforce the state-created municipal liability in the district court under section 1988, they would achieve a result which could not be reached through section 1983, under *Monroe* and

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[4b]At least one other federal court has examined the *Carter* opinion and also concluded that its reliance on the peculiar status of the District of Columbia considerably weakens the persuasive effect of the opinion, and rejected its application to a case involving an ordinary municipality. *See Ries v. Lynskey*, 452 F.2d 172, 175 (7th Cir. 1971).

Brown. This alone precludes application of section 1988, for the section, by its own terms, cannot be applied when the result would be inconsistent with the laws of the United States. *See Wilcher v. Gain*, 311 F.Supp. 754 at 755 (N.D. Cal. 1970).

Finally, we note that section 1988 has not been construed as having created a separate basis for prosecuting claims under the Civil Rights Act, but rather as pertaining to the "forms of process and the scope of remedy." *Pierre v. Jordan*, 333 F.2d 951, 958 (9th Cir. 1964) *cert. denied* 379 U.S. 974 (1965), *rehearing denied*, 380 U.S. 927 (1965). *Cf. Johnson v. New York State Ed. Dept.*, 319 F.Supp. 271, 276 (E.D. N.Y. 1970). Thus, it provides for the adoption of state law to cure remedial deficiencies in the federal act, but does not create any right of action in and of itself.[5]

We therefore hold that the district court properly dismissed the Civil Rights Act complaints against Alameda County.

II. *Pendent Jurisdiction over state claims.*

Appellants here contend that, even assuming they have not presented a cognizable federal claim under the Civil Rights Act, the trial court should have nevertheless retained jurisdiction to decide their pendent state claims.

We do not agree.

In dismissing the pendent state claims, the trial court relied primarily on our decision in *Hymer v. Chai*,

[5]This is consistent with the construction of section 1988 which was made in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969), wherein the Supreme Court sanctioned application of state law under section 1988 to make a damage determination. *See also* the dissent of Justice Harlan, *Id.* at 256-57.

407 F.2d 136 (9th Cir. 1969), in which this court held that pendent jurisdiction is available only to join claims, not parties. As the court below held that there was no viable federal claim against the County, it therefore concluded that the non-federal pendent claims could not be used to join the County in the action.

Appellants concede that *Hymer* was binding upon the district court. However, they argue that *Hymer* is questionable as a valid proposition of law, and contend that it is inconsistent with the general liberalization of the doctrine of pendent jurisdiction announced in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In support of this view, appellants have cited cases in which courts have permitted assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim.[6]

However, there are numerous decisions which have reached the opposite conclusion.[7] Moreoever, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because

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[6] *See Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3rd Cir. 1968); *Wilson v. American Chain and Cable Co.*, 364 F.2d 558 (3rd Cir. 1966); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968). *See also, Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

[7] *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969); *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964; *cert. denied*, 379 U.S. 964 (1965); *Barrows v. Faulkner*, 327 F.Supp. 1190 (N.D. Okla. 1971); *Hall v. Pacific Maritime Assn.*, 281 F.Supp. 54 (N.D.Cal. 1968).

that claim is related to a federal claim against an existing party.[8] Another has stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist.[9] Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized having "strained for jurisdiction."[10]

Aside from this obvious lack of judicial unanimity on the view propounded by appellant, it appears that only two decisions have decided the precise question involved herein, namely, whether a Civil Rights Act action against municipal employees will permit a federal court to join the municipality itself as a party solely on the basis of pendent state claims. Both have rejected the argument.

In *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied* 397 U.S. 990 (1970), the court upheld the trial court's refusal to exercise pendent jurisdiction over state claims against the City of Greensburg in a section 1983 action against one of its policemen. Similarly, in *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965), the court held that state claims against a city could not be pendent to a section 1983 claim against one of its police officers.

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[8]Wright, *Federal Courts* 65 (2d ed. 1970).
[9]3A *Moore's Federal Practice* (Supp.) ¶ 18.07 (1.-4).
[10]*Id.* ¶ 18.07 (1.-2) n. 28.

We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand,[11] we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims.

Furthermore, it appears that the district court's decision not to entertain the pendent state claims was correct, aside from the impact of *Hymer*.

Gibbs makes it clear that exercise of this pendent jurisdiction is discretionary in any case, and involves "considerations of judicial economy, convenience and fairness to litigants . . . ." 383 U.S. at 726. It is clear from the order of the district court[12] that it felt the instant case would be based on the California Tort Claims Act, involve special defenses available to the County, and call for the resolution of difficult questions of California law, upon which there was a dearth of authority.

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[11]Appellants have raised the contention that *Hesselgesser, supra*, by utilizing state law under section 1988 to impose vicarious liability on the county sheriff, and thereby bring him into the action solely on the basis of state claims, has impliedly overruled *Hymer*. An examination of the *Hesselgesser* opinion fails to disclose any such intent, nor, indeed, any mention of *Hymer* at all. We reject the argument.

[12]In footnote 5 of the opinion, the district court stated, in part:

> "Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard."

Thus, the district court also felt that as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims.[13] We agree.

For the foregoing reasons, we hold that the trial court properly dismissed appellants' pendent state claims against the County of Alameda.

III. *The County as a "citizen" for diversity purposes.*

In the *Moor* case a separate basis for jurisdiction, diversity of citizenship, was also alleged. The trial judge dismissed claims presented under this jurisdictional basis, noting our prior holding in *Miller v. County of Los Angeles*, 341 F.2d 964 (9th Cir. 1964), in which this court held that a California county is not a citizen for federal diversity purposes.

Appellant Moor contends that we should reconsider this position in light of authority holding that a county is a "citizen" for diversity purposes.[14]

Our position had its inception in *Lowe v. Manhattan Beach City School Dist.*, 222 F.2d 258 (9th Cir. 1955) in which this court held that a school district was not a citizen for diversity purposes. The reasoning of that opinion was subsequently applied to a suit

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[13]Appellants contend that the County, by appearing to generally contest the action, had waived any right to later contest the jurisdictional issue. The short answer to this is contained in *Gibbs*, in which the Supreme Court stated that pendent state claims might appropriately be dismissed at any time. 383 U.S. at 726-27.

[14]*Brown v. Marshall Cty.*, 394 F.2d 498 (6th Cir. 1968); *Pettibone v. Cty.*, 120 F.2d 850 (8th Cir. 1941); *Harris Cty. v. Ideal Cement Co.*, 290 F.Supp. 956 (S.D. Tex. 1968).

against a California county, in *Miller*. That holding is still the law in the Ninth Circuit. *Cf. Fifty Associates v. Prudential Insurance Co.*, 446 F. 2d 1187, 1191 (9th Cir. 1970).

The opinion in *Fifty Associates* makes it clear that we are by no means alone in holding that a state agency may not be a party to a diversity action. *See* 446 F.2d at 1191 and cases cited therein.

We therefore hold that the district court properly rejected appellant Moor's allegation of diversity of citizenship and correctly dismissed claims brought thereunder. As we have previously concluded that appellants' allegations of jurisdiction under the Civil Rights Act and the doctrine of pendent jurisdiction were also properly rejected by the district court, we therefore hold the decision of the court dismissing all claims against the County of Alameda was correct, and must be affirmed.

Affirmed.

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

David Moor, Plaintiff-Appellant, v. Frank I. Madigan, Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendants-Appellees. No. 71-3019.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiff-Appellant, v. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendant-Appellee. No. 71-3020.

Filed: May 30, 1972.

On Petition for Rehearing and for Rehearing In Banc Before: HAMLIN, MERRILL and DUNIWAY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

For the Court:

Oliver B. Hamlin, Jr.
Circuit Judge

APPENDIX C.

Order.

United States Court of Appeals, for the Ninth Circuit.

David Moor (71-3019), William D. Rundle, Jr., etc. (71-3020), Plaintiffs-Appellants, v. Frank I. Madigan, et al., Defendants-Appellees, Nos. 71-3019, 71-3020.

Filed: Jan. 24, 1972.

Before: DUNIWAY and HUFSTEDLER, Circuit Judges

Appellants' motion to consolidate the appeals in *Moor v. Madigan*, No. 71-3019, and *Rundle v. Madigan*, No. 71-3020, is granted.

The appeals are ordered expedited. Appellants' opening brief shall be filed not later than February 9, 1972; appellees' brief shall be filed not later than February 23, 1972; appellants' reply brief, if any, shall be filed not later than March 3, 1972. Oral argument will be set for the week of March 6, 1972, in San Francisco on a date hereafter to be fixed.

B. C. Duniway
Shirley Hufstedler

APPENDIX D.

Order.

In the United States District Court, Northern District of California.

Robert Scheer, Plaintiff, v. Frank Madigan, et al., Defendants. No. C-70 155 RFP.

William Donovan Rundle, Jr., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70 334 RFP.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C-70 333 RFP.

In these civil rights cases, written and oral argument has been tendered to the court on plaintiffs' discovery motions to compel further answers to interrogatories and on defendants' motion to dismiss the complaint as to the County of Alameda. The court makes its order as follows:

. . .

VI. MOTIONS TO DISMISS

Rundle v. Madigan: County of Alameda's motion to dismiss is granted. The contentions raised in opposition have already been passed upon by the court in the related case of *Scheer v. Madigan,* and the court sees no reason to deviate from that ruling.

Moor v. Madigan: In opposition to this motion, plaintiff presents interesting arguments based on a diversity of jurisdiction theory. The thrust of plaintiff's argument is that Cal. Government Code § 815.2 gives

plaintiff a state cause of action against the County of Alameda, and that plaintiff can choose to litigate this cause of action in a federal forum on a diversity of jurisdiction basis just like any other state action. Defendant's brief is not responsive to this argument, and the court, not having considered these contentions before, would benefit from a counter presentation. Accordingly, defendant is hereby instructed to file a brief responsive to plaintiff's diversity argument within fifteen days of receipt of this order. Plaintiff may reply, within ten days of receipt of defendant's papers.

One specific point on which the court seeks advice of counsel is whether *Monroe v. Pape*, 365 U.S. 167 (1961), would preclude the recognition of a cause of action against the county under § 815.2 where the underlying liability of the county employee is predicated upon a violation of the Civil Rights Act. That is, would the recognition of such a *state* cause of action run fatally counter to *Monroe* and to the position of the Ninth Circuit (e.g., *Brown v. Town of Caliente*, 392 F.2d 546 (1968)); by achieving indirectly what these courts have held cannot be done directly?

Another specific inquiry involved here is whether, as a matter of state law, § 815.2 affords a cause of action against the county where the underlying tort of the employee was intentional.

Because briefing on these and related questions will prove helpful, the submission of this aspect of the motion to dismiss is vacated. A ruling on the motion to

dismiss in this case will await the further written argument.

Of course, no further briefing is required on the §§ 1981 and 1988 grounds urged in opposition to this motion. These contentions have been considered and rejected in *Scheer* and *Rundle*, and are also rejected here.

Accordingly, the motion to dismiss in *Rundle v. Madigan* is GRANTED, and the motion to compel further answers is ruled upon as hereinbefore indicated.

SO ORDERED.

DATED: March 31, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX E.

Order Affirming Prior Order Granting Defendant County of Alameda's Motion to Dismiss.

In the United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C-70 333 RFP.

* * *

This case is a companion case to *Rundle v. Madigan*, C-70 334, in which this court held that the doctrine of pendent jurisdiction was not available to enable plaintiff to sue the County of Alameda in this court absent an independent basis of federal subject matter jurisdiction as to the County itself. This court considered itself bound by the case of *Hymer v. Chai*, 407 F.2d 136 (Ninth Cir. 1969) in concluding that pendent jurisdiction was not available to bring in additional parties. For the reasons stated in the *Rundle* Memorandum and Order, any similar pendent jurisdiction arguments tendered in this case are also rejected.

In this case only,[1] however, plaintiff argues that an independent federal jurisdictional basis does exist as to the County, viz., diversity of citizenship. See 28 U.S.C. § 1332. If such jurisdiction does exist, it is because the defendant County is a "citizen" for diversity purposes. While plaintiff's argument on this threshold point has substantial merit, this court is bound to recognize and adhere to the Ninth Circuit decisions

[1]Plaintiff Moor alleges that he is a citizen of the State of Illinois; plaintiff Rundle is a citizen of the State of California.

which hold that California counties and other subdivisions of the State are not "citizens" for diversity purposes. *Lowe v. Manhattan Beach City School District*, 222 F.2d 258 (1955); *Miller v. County of Los Angeles*, 341 F.2d 964 (1965), 364 F.2d 500 (1966), *cert. denied* 386 U.S. 990 (1967). This court is fully cognizant of the fact that the substantial weight of authority is contra the position of the Ninth Circuit; moreover, this court is also aware of the possibility that the question of whether California counties are "citizens" within the meaning of § 1332 may not have received from the Ninth Circuit the full attention and complete analysis which the question obviously deserves. See *White v. Umatilla County*, 247 F.Supp. 918 (D. Or. 1965). Nonetheless, this court is not free to disregard the reasonably clear conclusion of law contained in the above-cited cases. Re-examination of that conclusion is for the Ninth Circuit.

Diversity of citizenship is a basis of subject matter jurisdiction. Such jurisdiction is not waivable by the parties, and may be examined at any time. Plaintiff's arguments based upon a waiver by the County, if intended to merit consideration with regard to subject matter jurisdiction, are therefore misplaced and inapposite. Insofar as the waiver argument is raised in connection with the pendent jurisdiction theory, decision on the purported waiver is unnecessary in light of the court's holding that pendent jurisdiction is unavailable in the circumstances of this case.

Accordingly, this court's order granting the County of Alameda's motion to dismiss as to plaintiff's First and Second Causes of Action is affirmed.

The court's rulings herein also make it clear that no jurisdiction resides in this court to adjudicate plaintiff's Third and Fourth Causes of Action as to County defendant. Accordingly, the County is ordered dismissed from those remaining causes of action as well, and plaintiff's motion is denied.

So ordered.

Dated: Aug. 25, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX F.

Memorandum and Order Affirming Prior Orders Granting Defendant County of Alameda's Motions to Dismiss.

In the United States District Court, Northern District of California.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70 334 RFP.

* * *

This case is one of several related civil rights actions stemming from what has become known as the "People's Park" controversy. Plaintiff claims that his federal civil rights were violated by a conspiracy among the defendants—the Sheriff and various deputies of Alameda County—to utilize unlawful force in suppressing an assembly of persons in the streets of Berkeley, California, on May 15, 1969, and by the unlawful shot-gun shooting of plaintiff on that day. Claims based upon state law are also asserted.

In an earlier order, this court granted the defendant County of Alameda's motion to dismiss on the ground that it was not amenable to suit under the Civil Rights Act since it was not a "person" within the meaning of that Act. 42 U.S.C. § 1983. This was undoubtedly a correct statement of the law, *Monroe v. Pape*, 365 U.S. 167 (1961), and plaintiff does not presently dispute this.

The Court also ordered that the state claims be dismissed as to the County. It is this latter order which plaintiff now seeks to reverse.

The basis for this motion for reconsideration is that the state claims against the County should be retained in this action on the theory of pendent jurisdiction. More precisely, plaintiff argues that this court need not have an independent basis of federal subject matter jurisdiction as to the County, provided that the court has subject matter jurisdiction as to the other defendants, and provided further that the facts which underlie the state cause of action against the County are essentially the same as those which underlie the federal cause of action against the other defendants. Plaintiff further argues that the County has waived any objections to the assertion of personal jurisdiction over it; that in fact a good state cause of action can be predicated against the County on the basis of the California Tort Claims Act (Cal. Gov't. Code § 815.2); and that nothing in the Civil Rights Act or *Monroe v. Pape*, 365 U.S. 167 (1961), precludes this court from recognizing a state cause of action against a County where the underlying liability of the county is based upon a Civil Rights Act violation by a county employee.

The defendant County basically and simply argues that the doctrine of pendent jurisdiction is not applicable unless the federal claim and the state claim are asserted against the same party. That is, the doctrine cannot be employed to bring in additional parties as to which the court does not have an independent basis of federal subject matter jurisdiction.

While plaintiff has skillfully briefed many interesting arguments, the court concludes that at least within the Ninth Circuit, the defendant County is correct that pendent jurisdiction is not available in the circumstances

of this case. Accordingly, the court does not reach plaintiff's other contentions.

The controlling point is that in the Ninth Circuit pendent jurisdiction is available only to join claims, not to join parties. *Hymer v. Chai*, 407 F.2d 136 (1969). That is, the concept applies "only where the same parties are involved on the state and federal claims." Wright, *Federal Courts* (2nd Ed. 1970), at 65. Since there is no federal claim alleged against the County, no state claim against the County is within the pendent jurisdiction of this court, no matter how closely related factually that state claim may be to a federal claim against another defendant. On this view of the doctrine—viz. that the doctrine is simply not available—this court is devoid of the power to adjudicate the state claim against the County; the issue is not one of discretion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966).

In *Hymer v. Chai, supra,* a husband and wife brought a personal injury diversity action in the United States District Court for Hawaii. The husband sought $75,000 damages for personal injuries and property damage, while the wife sued for loss of consortium. The wife claimed only $7,500, an amount below the monetary minimum necessary to sustain federal diversity jurisdiction (28 U.S.C. § 1332(a)). Diversity of citizenship was the only possible basis for federal jurisdiction.

The Ninth Circuit ruled that the District Court had erroneously assumed jurisdiction of the wife's cause of action, since that cause of action was not independently federally cognizable, and since joinder of an additional party was not the object of the doctrine of pendent jurisdiction.

Plaintiff seeks to avoid the impact of *Hymer* by arguing that Hymer is distinguishable from the present case and that, in any event, *Hymer* is questionable as a valid proposition of law. Dealing with the latter point first, it is true that *Hymer* relied heavily on a case which long ante-dated the *Gibbs* decision, viz. *Kataoka v. May Dep't. Stores Co.*, 115 F.2d 521 (Ninth Cir. 1940). It is also true that other circuits have permitted the application of pendent jurisdiction in factual situations essentially indistinguishable from that of *Hymer*. See *Stone v. Stone*, 405 F.2d 94 (Fourth Cir. 1968); *Jacobsen v. Atlantic City Hospital*, 392 F.2d 149 (Third Cir. 1968); *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (Eighth Cir. 1969). The short and authoritative answer to plaintiff's latter contention is that whether or not the Ninth Circuit's position in *Hymer v. Chai* represents a dying view, that position was firmly stated and is binding on this court.

Whether *Hymer* is significantly distinguishable from the present case, however, is a question to which this court may properly address itself. In *Hymer* the court refused to allow the joinder of an additional party plaintiff who could not assert a federally cognizable claim against the defendant. In this case, however, the issue is whether to allow the joinder of a defendant against whom the plaintiff cannot state a federally cognizable claim. Further, in *Hymer* the jurisdiction of the court was based upon diversity of citizenship, whereas in this case, the court's jurisdiction rests upon a federal question.

This court's first response to this argument is that in an analysis of pendent jurisdiction, it is not particularly relevant to inquire whether the assertion of

pendent jurisdiction will enable an additional plaintiff or defendant to be joined. The basic inquiry in this regard is whether the doctrine may be employed to allow the joinder of any party who could not otherwise be in a federal court. And on this point, *Hymer v. Chai* speaks quite directly: "Joinder of claims, not joinder of parties, is the object of the doctrine." 407 F.2d at 137.

If, however, it is relevant to inquire whether a plaintiff or defendant will be the party joined, the joinder of a plaintiff is the more permissible and acceptable result, since this does not force an unwilling party into a federal forum, as is the case where an additional defendant is joined. To put the matter another way, if in *Hymer v. Chai* the wife had been permitted to assert her claim for loss of consortium, no great hardship would have been placed upon the defendant, since the defendant was already in the federal forum. Here, however, the state claims would serve to bring into federal court a defendant who would not otherwise be there. Thus, since the court in *Hymer* did not allow the doctrine of pendent jurisdiction to operate where its effect would have been to join an additional plaintiff, *Hymer v. Chai* counsels strongly against employing the doctrine where an additional defendant would be joined.[1]

As noted, another difference between *Hymer* and the present case is that *Hymer* was a diversity case whereas this one is a federal question case. On this point, the Fourth Circuit has stated that both instances should be treated similarly because "[i]n each situation, the federal court has before it a claim which clearly satisfies the requirements of § 1331 or § 1332,

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[1]See Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv. L.Rev. 657, 664 (1968).

and in each instance the plaintiff asserts an additional claim which, if litigated alone, would not satisfy a jurisdictional requirement." *Stone v. Stone*, 405 F.2d 94, 97 (1968). If this position is accepted, then *Hymer v. Chai* would be apposite in the present case and would defeat plaintiff's motion.

If, however, federal question and diversity cases are to be treated differently, then a stronger case can probably be made for the application of the pendent jurisdiction doctrine, (where its effect is to bring in an additional party), in the diversity context than in the federal question context. Significantly, in those cases where this question has been considered, "pendent parties"[2] have recently been permitted in the diversity cases, but disallowed in the federal question cases.[3] One factor apparently underlying this differential treatment is that in a diversity situation, the claims are all based upon state law, and so one would expect them to be litigated together. In the federal question case, however, if the federal jurisdiction is exclusive, then one would not expect the claims to be bundled together in the same forum. See *Tucker v. Shaw*, 308 F.Supp. 1, 9 (E.D. N.Y. 1970).[4]

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[2]Id. at 662. The term of course denotes the additional party, whether plaintiff or defendant, that has been brought into the litigation by the application of the pendent jurisdiction doctrine. The claim asserted by or against this party is not within the subject matter jurisdiction of the federal courts.

[3]Compare *Stone v. Stone*, 405 F.2d 94 (Fourth Cir. 1968), *Jacobsen v. Atlantic City Hospital*, 392 F.2d 149 (Third Cir. 1968), and *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (Eighth Cir. 1969) with *Wojtas v. Village of Niles*, 334 F.2d 797 (Seventh Cir. 1964) (civil rights action), *Gautreau v. Central Gulf Steamship Corp.*, 255 F.Supp. 615 (E.D. La. 1966) (Jones Act), and *Tucker v. Shaw*, 308 F.Supp. 1 (E.D. N.Y. 1970) (action under § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959).

[4]This court does not place great emphasis upon this factor, since to a certain extent, it has been ill-conceived. The Supreme

Probably the most influential factor, however, has been that in the diversity cases where "pendent parties" have been permitted, the courts have generally been confronted with claims by members of a single family arising out of a single accident. See Wright, *Federal Courts* (2nd Ed. 1970) at 124, and cases cited therein at n.19. The litigation of these intimately related claims in a single forum makes good practical sense. Moreover, the fact that the claims are so closely related more readily permits the conclusion that the claims comprise but one constitutional "case or controversy." See *United Mine Workers v. Gibbs*, 383 U.S. 715 at 725; *Stone v. Stone*, 405 F.2d at 97-8. In the federal question context, however, no such considerations generally exist.

What this analysis demonstrates is this: In *Hymer v. Chai*, the Ninth Circuit was presented with the most favorable of circumstances in which to apply pendent jurisdiction to join an additional party: the claims were state claims; they were closely related; the "pendent party" would be a plaintiff. Nonetheless, the court refused to apply the doctrine. In light of that decision, this court is unable to permit the application of the doctrine to the present case.[6]

Court in *Gibbs* stated that the claims should be considered *without regard to their federal or state character* in dealing with the issue of whether all the claims would ordinarily be tried in one judicial proceeding. 383 U.S. at 725.

[6]Without expressing any opinion on the following, the court notes that even were it free of the influence of *Hymer v. Chai*, serious obstacles to the application of the doctrine would still present themselves. First, on the issue of the *power* to adjudicate the claim, the court would still be confronted with the reluctance of other federal courts to permit a pendent party defendant in a federal question case. See *Wojtas v. Village of Niles, Gautreau*

(This footnote is continued on next page)

A final problem which the court must consider is whether the recent Ninth Circuit decision in *Hesselgesser v. Reilly*, No. 26,079, April 8, 1971, indicates the existence of subject matter jurisdiction regarding plaintiff's state claims against the County. In *Hesselgesser*, a prisoner sought damages under the Civil Rights Act against the Sheriff of Spokane County, Washington, (and the Sheriff's official bond), and a deputy sheriff who served as jailer. The court observed that the plaintiff's claim against the sheriff and his bond was not predicated upon any personal knowledge or personal involvement of the sheriff in the wrongs committed by his deputy. Rather, the claim was based upon Washington statutes which, as plaintiff alleged and the court found, provided that sheriffs would be liable for the negligence and misconduct of their deputies irrespective of any lack of knowledge or participation on the part of the sheriff. The Court of Appeals construed § 1988 of the Civil Rights Act (42 U.S.C § 1988) as authorizing the application of that state law, and accordingly reversed a judgment n.o.v. which had been entered in favor of the sheriff and his bond.

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v. Central Gulf Steamship Corp., and *Tucker v. Shaw*, all *supra* at n.3.

Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 Stan. L.Rev. 262, 265-66 (1968).

Plaintiff herein contends that under *Hesselgesser*, if California law provides a cause of action against the County-defendant for the alleged misconduct of county employees, then § 1988 provides the means of recognizing that cause of action, *and* confers jurisdiction upon this court to hear that action.[6]

The fault with this argument is that the latter proposition is erroneous: § 1988 does not supply the court with federal subject matter jurisdiction. Rather, in the words of the Ninth Circuit, the section ". . . pertains not to subject-matter jurisdiction, but to the forms of process and the scope of remedy." *Pierre v. Jordan*, 333 F.2d 951, 958 (1964); *Johnson v. New York State Ed. Dept.*, 319 F.Supp. 271, 276 (E.D. N.Y. 1970); cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (Douglas, J., for the Court), 256-57 (Harlan, J., dissenting opinion). Section 1988 empowers federal district courts to draw upon state law to fashion appropriate, effective remedies for civil rights violations. In so doing, the court may recognize a state law cause of action, as was done in *Hesselgesser*. But § 1988 is not "jurisdictional" in the sense that, for example, § 1983 is: it does not create a federal cause of action which is thereby cognizable in the district courts under § 1331 and/or § 1343 of Title 28.

The *Hesselgesser* opinion is therefore somewhat mysterious insofar as considerations of subject matter jurisdiction are concerned. The court looked to the law

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[6]Plaintiff apparently also argues that if *Hesselgesser* does not stand for the proposition that § 1988 is jurisdictional, then it surely means that the Ninth Circuit has now endorsed the "pendent party" concept, contrary to *Hymer v. Chai*. Both propositions will be discussed.

of Washington to hold the sheriff of the County liable so that a suitable remedy would be furnished the plaintiff, namely, recourse to the official bond. But the court did not discuss the basis upon which the federal courts had subject matter jurisdiction to adjudicate that state claim. While it appears that the state claim could only have been adjudicated upon some theory of ancillary or pendent jurisdiction, this court is not prepared to draw conclusions upon issues of such moment from an opinion which is silent upon the subject. In effect, plaintiff asks this court to conclude that *Hesselgesser* undermined *Hymer v. Chai sub silentio*. The court declines the invitation.

Accordingly, this court's orders granting the County of Alameda's motions to dismiss are affirmed, and plaintiff's motion herein is DENIED.

So Ordered.

Dated: August 30, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX G.

Order.

In the United States District Court, Northern District of California.

Robert Scheer, Plaintiff, vs. Frank Madigan, et al., Defendants. No. C-70 155 RFP.

There are three motions before the Court. Each will be treated in turn.

I. Motion to Dismiss. While plaintiff makes interesting arguments, this Court feels bound by the weight of authority to grant the motion and dismiss defendant City of Berkeley and the County of Alameda as to the first and second causes of action. *E.g., Brown v. Town of Caliente,* 392 F.2d 546 (9th Cir. 1968). The pendant claims must also be dismissed. *Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969).

. . .

IT IS SO ORDERED.

Date: June 17, 1970.

/s/ Robert F. Peckham
United States District Judge

APPENDIX H.

Order.

In the United States District Court, Northern District of California.

Daniel Porter, a minor, by & through his Guardian ad Litem, Donald E. Porter, Plaintiff, vs. Frank Madigan, et al., Defendants. No. C-70 384 RFP.

This matter comes before the Court on plaintiff's motion to strike defendant Schillinger's affirmative defenses two, three, four and seven and on defendant City of Berkeley's motion to dismiss. Alameda County has joined in this motion.

II. Motion to Dismiss. Plaintiff makes a provocative and persuasive argument that the abolition of municipal immunity should permit assertion of liability under § 1983. Were this Court free to determine the issue for itself, it might well agree with plaintiff. However, we feel compelled by the substantial weight of authority to hold that a local government may not be held liable under § 1983 as presently construed. *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Therefore the motion to dismiss must be granted as to the federal cause of action as to the City of Berkeley and the County of Alameda.

As to the pendant claim, the motion will be granted. *Hymer v. Chai*, 470 F.2d 136 (9th Cir. 1969).

IT IS SO ORDERED.

DATED: June 16, 1970.

/s/ Robert F. Peckham
United States District Judge

APPENDIX I.

[Letterhead].

University of California, Berkeley

California Law Review
School of Law
Berkeley, California 94720

May 17, 1972

Richards, Watson & Dreyfuss
Wilshire-Flower Building
615 South Flower Street
Los Angeles, California 90017

Dear Sirs:

I am writing a comment for The California Law Review on "pendent parties" as an extension of pendent jurisdiction. I am interested in the case of Rundle v. Madigan, 331 F.Supp. 492, No. C- 70 334, Aug. 30, 1971, in which you were attorneys for the plaintiff. If it would be possible to have a copy of the brief I would be happy to pay for costs.

Sincerely yours,

/s/ Stephen Yoder
Stephen Yoder
Managing Editor

APPENDIX J.

[Letterhead].

The University of Toledo
College of Law

June 6, 1972

Mr. Ronald M. Greenberg
Richards, Watson & Dreyfuss
615 S. Flower St.
Los Angeles, Cal. 90017

Re: Moor v. Madigan, et al. No. 71-3019
Rundle, et al. v. Madigan, et al. No. 71-3020
April 12, 1972

Dear Mr. Greenberg:

A member of our Law Review staff is writing a note on the above set of cases. To assist him in his work, it would be very valuable if he could make use of your briefs and records in these cases. If any subsequent action has been taken, that information would also be of interest.

These papers will be returned if you so desire, and they should not be needed for more than a few months. We will be happy to send you a complimentary copy of the student Law Review in which the note appears. Thank you very much for your cooperation.

Sincerely,

/s/ Thomas A. Breslin
Thomas A. Breslin
Editor-in-Chief
TAB/dma